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No. 92-463

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

UNITED CEREBRAL PALSY ASSOCIATIONS OF NEW YORK STATE, INC.,

Petitioner,

against

MARIO CUOMO, as Governor of the State of New York; ELIN HOWE, as Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities; MARK R. CHASSIN, as Commissioner of the New York State Department of Health; MARY JO BANE, as Commissioner of the New York State Department of Social Services; PATRICK BULGARO, as Director of the Budget,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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(2515—LC7-582—1992)

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Counterstatement of the Question Presented

Whether, in view of the fact that 42 C.F.R. § 447.45(d)(4) requires payment of Medicaid claims to petitioner within 12 months of the receipt of properly submitted claims, and there is no other applicable provision in the Boren Amendment of the Medicaid Act, its implementing regulations, or the State Medicaid Plan, which requires that Medicaid payments be made sooner, on any particular date or within any particular time period, no review by this Court is called for where this Court recently denied a writ for certiorari in the only other case which reached the same conclusion on the identical legal issue.

Table of Contents.

Page

Counterstatement of the Question Presented..... i

Table of Authorities..... iii

Statutes and Other Authorities iii

Statement of the Case 2

Reasons for Denying the Writ:

There is no reason warranting the grant of a writ of certiorari here. This Court has recently denied certiorari in a case presenting the same legal issue. The interlocutory order and decision of the court below do not conflict with this Court's interpretation of the Boren Amendment, other Courts of Appeals' decisions, and the express language of the relevant statutes and regulations. The order and underlying decision below were correctly decided and there is no other reason for granting a writ of certiorari..... 4

CONCLUSION: The petition for a Writ of Certiorari should be denied 9

TABLE OF AUTHORITIES.

Page

CASES:

Association of Surrogates & Supreme Court Reporters v. New York, 940 F.2d 766 (2d Cir. 1991), cert. denied, ____ U.S. ____, 112 S. Ct. 936 (1992) .. 5

Illinois Council on Long Term Care v. Bradley, 957 F.2d 305 (7th Cir. 1992), cert. denied, ____ S. Ct. ____, 61 U.S.L.W. 3256 (October 5, 1992) ... 4, 7, 8

Massachusetts General Hospital v. Sargent, 397 F. Supp. 1056 (D. Mass. 1975) 6

Ohio State Pharmaceutical Assn. v. Creasy, 587 F. Supp. 698 (S.D. Ohio 1984) 6

St. Tammany Parish Hospital Dist. v. Dept. of Health & Human Resources, 677 F. Supp. 455 (E.D. La. 1988) 6

Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990) 5, 6

STATUTES AND OTHER AUTHORITIES:

42 C.F.R. § 447.45(d) (4)..... i, 5, 7

42 U.S.C. § 1396, *et seq.* 2

42 U.S.C. § 1983 6

Page

42 U.S.C. § 1396n(b) (4) 7

42 C.F.R. § 447.250, *et seq.* 7

42 C.F.R. § 447.253 ..... 6, 8

42 C.F.R. § 430.12(c) 8

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OCTOBER TERM, 1992.

UNITED CEREBRAL PALSY ASSOCIATIONS OF NEW YORK STATE, INC.,

Petitioner,

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MARIO CUOMO, as Governor of the State of New York; ELIN HOWE, as Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities; MARK R. CHASSIN, as Commissioner of the New York State Department of Health; MARY JO BANE, as Commissioner of the New York State Department of Social Services; PATRICK BULGARO, as Director of the Budget,

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Mario Cuomo, Elin Howe, Mark R. Chassin, Mary Jo Bane, and Patrick Bulgaro respectfully request that the Court deny the petition for a writ of certiorari

seeking review of the Second Circuit's denial of petitioner's request for a preliminary injunction to prohibit New York State from sending out Medicaid payments 14 days later than the payments had previously been sent.

Statement of the Case

The Statement of the Case offered by petitioner contains certain factual inaccuracies and erroneous conclusions of law. Accordingly, a brief Statement of the Case is offered by respondents.

The State, assisted by the federal government and federal funding under the Medicaid Program (42 U.S.C. § 1396, *et seq.*), reimburses providers enrolled in the program for the cost of rendering medical care to qualified patients. Providers submit their claims to the Medicaid Management Information System ("MMIS") after services have been rendered. Such claims are processed, and if approved as valid, a check for payment is issued and released to the provider.

Petitioner erroneously contends that only nongovernmental providers are reimbursed through the MMIS. The MMIS is responsible for the processing of payment of Medicaid reimbursement to both governmental and nongovernmental Medicaid providers for services rendered to Medicaid recipients.

In 1991, due to fiscal constraints, and with prior notice to petitioner and the other providers, the State implemented a delay in Medicaid payments. Ultimately, a 14-day delay in checks was gradually implemented over a five month period

of time so that by the end of the State's 1991-1992 fiscal year, on March 31, 1992, the MMIS payments were sent out within 28 days of the receipt of properly submitted claims.

As a result of this delay there were two weeks in which no Medicaid checks were released; however, contrary to petitioner's statements, no withholding of payment occurred. The State continued to reimburse providers such as petitioner for those two weeks, but only on a slightly more delayed schedule than before. Petitioner was and is still being paid for all services rendered and at the established rate of payment. Medicaid checks continue to be sent out on a weekly basis for bills submitted 28 days earlier.

Petitioner additionally makes contentions in the section in its petition entitled "Effect of Permanent Payment Delay on Petitioner" which are factually unsupported. While petitioner's complaint and declarations submitted to the district court contained conclusory speculations about the future effect of the 14-day delay in payments, there was no factual evidence below that the petitioner in fact lost vendors, cut programs and services, and laid off therapists, clinicians and other employees, and that, if this occurred, it was the result of the delay in payments.

REASONS FOR DENYING THE WRIT

There is no reason warranting the grant of a writ of certiorari here. This Court has recently denied certiorari in a case presenting the same legal issue. The interlocutory order and decision of the court below do not conflict with this Court's interpretation of the Boren Amendment, other Courts of Appeals' decisions, and the express language of the relevant statutes and regulations. The order and underlying decision below were correctly decided and there is no other reason for granting a writ of certiorari.

Petitioner seeks to review the Second Circuit's interlocutory order denying petitioner a preliminary injunction ordering quicker reimbursement. The Second Circuit held that petitioner is not likely to succeed on the merits of its claims that the State's additional 14-day delay in Medicaid reimbursement (or payment of Medicaid claims within 28 days after the receipt of properly submitted claims) violates the Medicaid Act and its regulations. The court below, in denying petitioner's request for injunctive relief, agreed with the reasoning of the Seventh Circuit in *Illinois Council on Long Term Care v. Bradley,* 957 F.2d 305 (7th Cir. 1992), *cert. denied,* ____ S. Ct. ____, 61 U.S.L.W. 3256 (October 5, 1992). *Illinois Council* is the only other case the parties are aware of which presented the identical legal issue for review, although the State's delay in Medicaid reimbursement there was more extensive than the two week delay at issue here. This Court recently denied petitioners' request for a writ of certiorari in *Illinois Council* and there is no reason to rule otherwise here.

There is no conflict, direct or otherwise, between the Second Circuit's holding and this Court's decision in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), and the decisions in other circuit courts. All petitioner's arguments are based on the erroneous assumption that the Boren Amendment of the Medicaid Act applies to the date a Medicaid check is sent, notwithstanding that neither that statute nor its implementing regulations say anything about the date of payment.[1] As the Second and Seventh Circuits found, "the Boren Amendment requires that the *rates* of payment established by the State be adequate; there is no requirement as to the *date* of payment. On its face, the statute does not impose time limits or refer to timeliness in any way." Appendix A, p. 8.

Title 42 C.F.R. § 447.45(d)(4) sets forth time schedules for the payment of Medicaid reimbursement and requires only that payment of Medicaid claims to providers such as petitioner be made within 12 months of the receipt of properly submitted claims. Petitioner is receiving Medicaid reimbursement for all services rendered and at the established rate of payment within 28 days of the receipt of properly submitted claims, well within the permissible limits of 42 C.F.R. § 447.45(d)(4).

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[1]Petitioner erroneously contends that the State's delay in Medicaid payments is a reduction in the amount of payment. The Court below rejected this argument. Appendix A, pp. 9-10. To the extent petitioner bases this claim on *Association of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 936 (1992), and other cases which concerned the State's salary lag, petitioner assumes that the delay in Medicaid payments was implemented in the same manner as the State's salary lag of its employees. This is not the case. There is no factual evidence in the record below to support this assumption.

None of the cases cited by petitioner in which a violation of the Boren Amendment was found deal with the timeliness of Medicaid payments; they concern changes in the rate of Medicaid payments. *See, e.g., St. Tammany Parish Hospital Dist. v. Dept. of Health & Human Resources,* 677 F. Supp. 455 (E.D. La. 1988) (Emergency rule creating a 10% reduction in interim Medicaid reimbursement rates violated 42 C.F.R. § 447.253). *Wilder v. Virginia Hospital Assn.,* 496 U.S. 498 (1990), did not deal with the adequacy of Medicaid rates at all; the issue there was whether health care providers could enforce substantive federal rights under the Boren Amendment by bringing an action pursuant to 42 U.S.C. § 1983. *Wilder* said nothing about the timeliness of Medicaid payments.

The only cases cited by petitioner which concern the timeliness of payments do not involve the Boren Amendment. The courts in those cases found a violation of the Medicaid Act because the states were using their financial problems as an excuse to violate express federal statutory provisions and regulations which, unlike this case, required payment in 30 days. See *Ohio State Pharmaceutical Assn. v. Creasy,* 587 F. Supp. 698 (S.D. Ohio 1984), and *Massachusetts General Hospital v. Sargent,* 397 F. Supp. 1056 (D. Mass. 1975). Respondents here, even after the delay, will be making payments within 28 days.[2]

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[2]Even if, in contradiction to 42 C.F.R. §447.45(d)(4), a "prompt payment" requirement was assumed to be implicit in the Boren Amendment as petitioner suggests, the State's payment within 28 days would still be in compliance with such a requirement. Payment within 28 days would presumably be deemed "prompt payment" given that the shortest payment requirements in the Medicaid Act cited by petitioner provide for payment within 30 days of the receipt of proper claims.

The only decision which deals with the issue in this case is *Illinois Council* which is fully consistent with and supported by the rationale of the Second Circuit's decision. The supposed "conflict" among the court decisions, upon which petitioner bases its argument in support of granting the writ, does not exist. To the contrary, petitioner's interpretation that the Boren Amendment regulates the date of Medicaid payment, if accepted, conflicts with the express language of 42 C.F.R. § 447.45(d)(4), which requires that Medicaid payments be made within 12 months, and other provisions of the Medicaid Act. According to petitioner, Congress has amended other provisions of the Medicaid Act to require payments in 30 days and yet has chosen not to include providers such as petitioner within those amended provisions. *See, e.g.*, 42 U.S.C. § 1396n(b) (4).

Since the date of payment is not the same as the rate of payment, the Second Circuit's decision does not conflict with the other statutory and regulatory provisions cited by petitioner. Because the Boren Amendment only refers to changes in the rate of Medicaid payments, the regulations which implement the amendment also just refer to changes in the rate of Medicaid payments and not to this case. As the court below found, "[t]he regulations implementing the Boren Amendment, 42 C.F.R. Section 447.250, *et seq.*, refer only to adequate rate setting and say nothing about the date on which payment must be made. Where the regulations *do* speak of time requirements, 42 C.F.R. Section 447.45(d)(4), that provision requires that the Medicaid agency pay all claims within 12 months of the date of receipt. New York's 28 day repayment scheme is obviously within this." Appendix A, pp. 8-9.

Moreover, the change in date of Medicaid payments does not constitute a change in "payment methods and standards" so as to require the State to make findings and assurances pursuant to 42 C.F.R. § 447.253. As the court below held, "a change in the date of payment does not equal a change in the rate of payment, New York has not altered its methods and standards for setting rates, and thus the State has no obligation to make assurances or findings under this section." Appendix A, p. 12.

Finally, the delay in Medicaid reimbursement does not constitute a "material change in State law, . . . or in the State's operation of the Medicaid program" so as to require that the State amend its State Medicaid Plan under 42 C.F.R. § 430.12(c). The State Plan does not contain any additional requirements for timely processing of Medicaid claims for payment other that the 12-month requirement, and the State's payment is within that provision.[3]

There is thus also no conflict, direct or otherwise, between the Second Circuit's decision and the intention of Congress and the Executive Branch as expressed in the statutes and regulations petitioner cites.

For the reasons set forth above, the Second Circuit correctly decided this case. The Court determined it was unnecessary to review this identical legal issue arising in an interlocutory order only a month ago in *Illinois Council*, and there is no reason to do so now.

[3]Petitioner claims that the State's action knows of no limit or constraint and that the State could thus impose up to a year delay in payment. There is no evidence that the State intends to implement such delay. Moreover, since the State gets enhanced federal funds by complying with a 30-day time limit, there is no incentive for the State to go beyond the 30 days. Lastly, this is not a basis for giving petitioner the relief it requests. Any such claim is more appropriately made to Congress with a request to amend the Boren Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
October 28, 1992

Respectfully submitted,

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